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No. 467

IN THE
Supreme Court of the United States

October Term, 1963

ARROW CARRIER CORPORATION,
Appellant

vs.

UNITED STATES OF AMERICA
and
INTERSTATE COMMERCE COMMISSION,
Appellees

On Appeal from the United States District Court for the District of New Jersey.

MOTION TO AFFIRM
of the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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PENNSYLVANIA PUBLIC UTILITY COMMISSION

The Pennsylvania Public Utility Commission, Appellee in the above case, and intervening defendant in the Court below, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court be affirmed on the ground that the question is so insubstantial as not to warrant further argument.

I. OPINIONS BELOW

The "Report of the Commission" issued by Division 1 of the Interstate Commerce Commission (consisting of Commissioners Murphy, Goff and Herring) decided November 30, 1960 is printed at 83 M.C.C. 729, and is attached hereto as Appendix A. The "Report and Order Recommended by H. L. Hanback, Hearing Examiner" issued under service date May 16, 1960, is attached hereto as Appendix B. These reports were omitted from the Jurisdictional Statement. Since it appears to us that such reports should have been included under Rule 15, which requires the attachment of "the official and unofficial reports of the opinions delivered in the courts below," we have appended same to our Motion to Affirm.

II. JURISDICTION

We agree that jurisdiction by direct appeal to your Honorable Court is conferred by statute.

III. STATUTES INVOLVED

Section 202(b) of Part II of the Interstate Commerce Act (49 U.S.C. 302(b)):

> "Nothing in this part shall be construed . . . to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

The National Transportation Policy (see Note preceding Section 201, 49 U.S.C. §301)):

> One of the purposes of the Act is "to cooperate with the several States and the duly authorized officials thereof."

Section 204(a)(6) of Part II of the Interstate Commerce Act (49 U.S.C. 304(a)(6)):

> "It shall be the duty of the Commission—(6) To administer, execute and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; . . ."

These provisions may be added to those set forth by appellant in its Jurisdictional Statement.

IV. COUNTER-STATEMENT OF QUESTIONS PRESENTED

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1. Is subterfuge of a State's jurisdiction by an interstate commerce common carrier a violation of the Interstate Commerce Act enjoinable by the Interstate Commerce Commission?

Answered in the **affirmative** by Court below.

2. If so, is there substantial evidence to support a finding of subterfuge made by the Interstate Commerce Commission?

Answered in the **affirmative** by Court below.

V. STATEMENT

This is a direct appeal from the final judgment and decree entered on June 14, 1963, by a district court of three judges specifically constituted pursuant to 28 U.S.C. §§2284 and 2325, dismissing appellant's complaint which sought to set aside an order issued by the entire Interstate Commerce Commission.

On October 8, 1959, the Pennsylvania Public Utility Commission filed a complaint with the Interstate Commerce Commission under Section 204(c) of Part II of the Interstate Commerce Act, 49 U.S.C. §304(c) in accordance with the procedure prescribed by your Honorable Court in *Service Storage and Transfer Co., Inc. v. Commonwealth of Virginia*, 359 U.S. 171, p. 179, 79 S. Ct. 714, 3 L. Ed. 2d 717 (1959). The complaint against Arrow Carrier Corporation ("Arrow") was docketed MC-C-2696. It alleged, in substance, that: (1) Arrow is a motor carrier holding certificates of public convenience and necessity issued by the Interstate Commerce Commission, and, as such, is subject to the provisions of the Interstate Commerce Act, and (2) that it has transported property by motor vehicle between certain points and places in the Commonwealth of Pennsylvania through routes and highways in the Commonwealth of Pennsylvania and in the State of New Jersey, using the State of New Jersey as a subterfuge to circumvent the jurisdiction of the Pennsylvania Public Utility Commission and in violation of Sections 203(c) and 206(1), 49 U.S.C. §§303(c) and 206(1) of Part II of the Interstate Commerce Act, and in violation of Sections 202(b) and 202(c) of the Public Utility

Law of Pennsylvania, 66 Purdon's Pennsylvania Statutes Annotated 1122(b) and 1122(c), since Arrow failed to obtain the requisite certificates of public convenience required by the above-cited Acts to authorize the operations in question. The complaint set forth 20 specific instances of transportation, two of which were later shown at hearing (Tr. 330) to have been erroneously included. The remaining 18 shipments originated as follows: seven originated in Philadelphia and were destined for Catasauqua, Muncy, Shamokin, White Haven and three for Scranton, all in Pennsylvania; three originated in Shamokin for Philadelphia; two in Allentown for Philadelphia; two in Scranton for Philadelphia; one in Wilkes-Barre for Philadelphia; one in Bangor for Philadelphia; one in Swoyersville for Philadelphia; and one in Fort Washington for Lock Haven. The complaint prayed for the issuance of a cease and desist order.

A similar complaint had been filed by the Pennsylvania Public Utility Commission on August 24, 1959, against Hudson Transportation Company ("Hudson") docketed at MC-C-2671.

Prior to these complaints, Hudson and Arrow had each petitioned the Interstate Commerce Commission for a declaratory order seeking approval of its operations. These petitions, for all intents and purposes, became moot when the complaints had been filed. The background of these petitions concerns complaints which the P.U.C. had filed before itself against these carriers and these proceedings had progressed to various stages when the carriers filed their petitions for declaratory order. The P.U.C. proceedings were then stayed, pending the outcome of the I.C.C. proceedings.

The following motor carriers holding certificates of public convenience from the P.U.C. and which were affected by the challenged transportation adversely were

allowed to intervene on behalf of the P.U.C.: Highway Express Lines, Inc., Fowler & Williams, Inc., and Motor Freight Express.

The complaints and petitions were referred to an Examiner for hearing and recommendation of an appropriate order thereon. The aforesaid complaints and petitions were heard on a consolidated record at Philadelphia, Pennsylvania, on October 13 and 14 and December 3, 1959. Briefs were filed by all parties and on May 16, 1960, the Honorable H. L. Hanback, Hearing Examiner, used a Recommended Report and Order making the following dispositions: (1) In No. MC-C-2671 and No. MC-C-2696, defendants were found to be performing unauthorized transportation as a motor carrier of certain traffic between specified points in Pennsylvania via points in New Jersey. A cease and desist order was recommended; (2) In No. MC-113933 and No. MC-71536 and MC-71536 (Sub Nos. 1, 2 and 3), all matters to which the petitioners' petitions were directed were found to have been determined in the complaint proceedings. Accordingly, the petitions were denied.

Exceptions were filed by defendants to the Recommended Order, to which complainant and intervenors filed replies. On November 30, 1960, Division 1, consisting of Commissioners Murphy and Herring, Commissioner Goff not participating, issued its Report and Order adopting all the findings of fact made by the Examiner on the question of subterfuge, but finding that the complaints must be dismissed on the ground that the I.C.C. has no jurisdiction to enjoin a subterfuge of complainant's jurisdiction.

Complainant and the intervenors on its behalf filed Petitions for Reconsideration with the entire Interstate Commerce Commission, sitting as an appellate body over Division 1, praying for a cease and desist order as recommended by the Hearing Examiner.

By order dated September 22, 1961, the Interstate Commerce Commission granted the Petitions for Reconsideration and on March 27, 1962, issued its Order, adopting the findings of fact consistently made by Division 1 and the Hearing Examiner and issuing a cease and desist order against Hudson and Arrow ordering them "hereafter [to] abstain from holding themselves out or performing, under certificates issued by this Commission, all operations herein found to be, in effect, intrastate in character". The order was scheduled to become effective on May 7, 1962.

Complaints were subsequently filed by Arrow and Hudson with the United States District Court for the District of New Jersey to set aside the orders of the Interstate Commerce Commission. The effective date of the cease and desist orders of the I.C.C. was stayed by agreement pending determination of the complaints by the District Court. After briefing and argument before the three judge statutory court, consisting of Circuit Judge McLaughlin, Judges Wortendyke and Lane, the Court on June 14, 1963, issued its decision dismissing the complaints and finding that plaintiffs had misused their I.C.C. certificates in order to avoid the "rightful" jurisdiction of the Commonwealth of Pennsylvania over said transportation. The Court further declared that there was "overwhelming" evidence to support the findings of the Interstate Commerce Commission.

Upon request of Arrow Carrier Corporation to stay proceedings pending disposition of its appeal to your Honorable Court, the District Court on September 10, 1963, denied the petition. Notice of Appeal was filed in your Honorable Court on July 15, 1963. The Hudson Transportation Company did not appeal the order of the District Court.

VI.

THE QUESTIONS ARE INSUBSTANTIAL

ARGUMENT

(I) Subterfuge Is an Issue

The law of this case is to be found in *Service Storage & Transfer Co. v. Commonwealth of Virginia*, 359 U.S. 171, 79 S. Ct. 714, 3 L. Ed. 2d 717 (1959), which involved an interstate motor carrier that was transporting 3% of its truckload freight between points in the Commonwealth of Virginia through highways in adjoining West Virginia. On a writ of certiorari your Honorable Court held that the Commonwealth of Virginia could not prosecute the carrier for committing a subterfuge but that jurisdiction in the first instance was vested in Interstate Commerce Commission in order to avoid a multitude of interpretations of federal certificates. Your Honorable Court reversed the decision of the Supreme Court of Virginia finding a subterfuge and **in the words controlling the instant question at bar** said:

> "Finally, the Commonwealth is not helpless to act. If it believes that petitioner's operation is not bona fide interstate but is merely a **subterfuge** to escape its jurisdiction, it can avail itself of the **remedy** Congress has provided in the Act. Section 204(c), supra, note 2, authorizes the filing of a 'complaint in writing to the Commission by any * * * State board * * * (that) any * * * carrier * * * ' has abused its certificate. See also Castle v. Hayes Freight Lines, supra.

Thus the possibility of a multitude of interpretations of the same federal certificate by several States will be avoided and a uniform administration of the Act achieved."

That case, as here, involved:

(1) an interstate carrier;

(2) a carrier which was accomplishing its transportation of state freight by means of tacking (see 71 M.C.C. 304 for description of the tacking employed by Service Storage); and

(3) a carrier that was serving between points in Virginia by way of highways in West Virginia.

This Commission followed the procedure set forth by your Honorable Court in the *Service* case and filed its complaints with the Interstate Commerce Commission under Section 204(c), claiming that defendant's operation was not bona fide interstate but merely a subterfuge to escape its jurisdiction.

The District Court approved the procedure undertaken by the P.U.C. in these words (JS 9a):

"The procedure followed by the Pennsylvania Public Utility Commission in bringing these situations to the Interstate Commerce Commission is entirely proper. The Supreme Court in Service Storage & Transfer Co., Inc. v. Virginia, 359 U.S. 171 (1959) has told us that the interpretation of the kind of problem before us is, in the first instance, for the Interstate Commerce Commission under §204(c) of the Interstate Commerce Act, 49 U.S.C. §304(c). And see Jones Motor Co. v. Pennsylvania Public Utility Commission, 361 U.S. 11, Pet. recon. and clar. den. 361 U.S. 904 (1959).

"What the P.U.C. claimed to the Interstate Commerce Commission by its complaint was that in their actions outlined heretofore, Hudson and Arrow had abused their interstate certificates. In effect it alleged that the protested interstate routes of the truckers were nothing more than ingenuous schemes to evade Commonwealth of Pennsylvania regulations of the intrastate motor carrier business concerned by running the vehicles under the tacked interstate certificates."

Appellant in its Jurisdictional Statement, in effect, argues that subterfuge is not an issue because:

(1) It is observing the rules of tacking;

(2) The Interstate Commerce Act defines interstate commerce as transportation between points in the same State through another State;

(3) *Central Greyhound Lines v. Mealey*, 334 U.S. 653, 68 S. Ct. 1260, 92 L. Ed. 1633 (1948), holds that transportation between two points in one State through another State is interstate commerce.

Appellant in such argument overlooks the important and controlling pronouncement made by your Honorable Court in the *Service Storage* case. Certainly, your Honorable Court was fully aware of the doctrine of tacking (the Court quotes the I.C.C. unpublished report on page 177 of 359 U.S.); it was fully aware of the definition of interstate commerce contained in the Interstate Commerce Act; it was fully aware of its tax decision in *Central Greyhound Lines*, nevertheless your Honorable Court outlined the procedure to follow in such cases. As the I.C.C. observed: "Obviously, the Supreme Court in the *Service*

case did not suggest to the Commonwealth of Virginia a remedy that was in fact not available." (JS. 24a)

It is also interesting to note that your Honorable Court in footnote 4 of the *Service* case, adopts that portion of the I.C.C. opinion setting forth its interpretation of the law, as follows:

> "4. In its declaratory opinion the Commission noted: 'In the absence of any showing that petitioner's use of its *authorized* route is a subterfuge to avoid state regulation, or other than a logical and normal operation through the carrier's headquarters, we are of the opinion that petitioner's operations, in the manner described, constitute bona fide transportation in interstate commerce."

This is more than an inconsequential recognition of an irrelevant part of the I.C.C.'s decision. This is recognition of the existence of the question of *subterfuge* as an issue in the case. We may properly assume that your Honorable Court rarely places legal doctrines in its Opinions unless it believes in them. The foregoing language clearly establishes that an I.C.C. certificated carrier can, under a given set of facts, be utilizing its "authorized route" for the purpose of committing a subterfuge. The carrier can be engaging in an operation which is neither "logical" nor "normal".

Even in *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 660, 68 S. Ct. 1260, 92 L. Ed. 1633, your Honorable Court said:

> "There is no suggestion here that the interstate routes were utilized as a means of avoiding even in part New York's taxation. Compare, e.g., Eichholz v. Public Service Commission of Missouri, 306 U.S.

268, 59 S. Ct. 532, 83 L. Ed. 641, and Ryan v. Pennsylvania Public Utility Commission, 143 Pa. Super. 517, 17 A. 2d 637." [Certiorari denied, 314 U.S. 640, 62 S. Ct. 80, 86 L. Ed. 514 (1941); federal injunction denied, 44 F. Supp. 912 (D.C. Pa. 1942); Biggs, C. J., motion to dismiss granted, 317 U.S. 702, 63 S. Ct. 162, 87 L. Ed. 561 (1943).]

The doctrine in the *Service Storage* case that subterfuge can be halted by the Interstate Commerce Commission is part of the the decisional law. For example in *Austin v. Tenn.*, 179 U.S. 343, at page 361, the Court said:

> "And yet we are told that each one of these packages is an original package, and entitled to the protection of the Constitution of the United States as a separate and distinct importation. *We can only look upon it as a discreditable subterfuge, to which this Court ought not to lend its countenance.*"

See also *Interstate Busses v. Holyoke Ry.*, 273 U.S. 45, 51, 47 S. Ct. 298, 71 L. Ed. 530 (1927), and *Eickholz v. P.S.C. of Missouri*, 306 U.S. 268, 59 Sup. Ct. 532, 83 L. Ed. 641.

In *Intercity Coach Company v. Atwood*, 21 F. 2d 83 (D.R.I. 1927), appeal dismissed, 278 U.S. 663, 49 S. Ct. 78, 73 L. Ed. 569 (1928), the coach company sought to enjoin certain Rhode Island officials from prosecuting it for failing to obtain a permit for transportation between Providence, R. I., and Woonsocket, R. I., which the bus line was performing by way of Attleboro, Mass. The Rhode Island P.U.C. found that the coach company "was in reality trying to run a bus line between Providence and Woonsocket, both in R. I., and was diverting its route for a few miles through this thinly-settled portion of Massachusetts in order to ground a claim of needing no permit

from the R. I. authorities because engaged in interstate commerce", 21 F. 2d at 84.

The Court went on to say:

> "The question before us, taking the evidence most favorably to the plaintiff, is whether a bus, using the highways for carrying for hire intrastate passengers escapes state highway regulations because it may also carry an occasional interstate passenger. In our opinion it does not. Still less does it do so if (as on the present record is at least probable) the interstate character of the transportation is 'a discreditable subterfuge, to which this court ought not to lend its countenance.' Brown, J., Austin v. Tennessee, 179 U.S. 343, at page 361, 21 S. Ct. 132, 139 (45 L. Ed. 224). In Kirmeyer v. Kansas, 236 U.S. 568, 35 S. Ct. 419, 59 L. Ed. 721, an alleged interstate transaction is referred to by the court as being 'not a bona fide commercial arrangement.' *In our opinion, interstate commerce, in order to be entitled to the protection of the federal Constitution, must be real and bona fide.* The question whether it is so is open to inquiry." (21 F. 2d 85) (Emphasis added.)

Furthermore, we find in a careful review of the Federal Motor Carrier of 1935 (Part II of the Interstate Commerce Act) and its legislative history an underlying purpose to prevent I.C.C. carriers from committing such a subterfuge. For example, Congressman Merritt in discussing the Bill stated on page 12207 of Vol. 79 of the 74th Congress, as follows:

> "But the demands of the State regulatory bodies for Federal control of interstate business by buses and trucks is unanimous. It has been found in some

cases that bus lines and other forms of transportation will nominally start just over the line of one State, but do the major part of their business in adjoining States simply for the purpose of using its interstate character to escape the control and the regulation of the State in which the major part of its business is done. From this point of view alone, a Federal law is not only justified but demanded."

In the House Committee Report (H.R. Rep. 1645—74th Congress to accompany S. 1629, 74th Congress, which became the Motor Carrier Act of 1935), it is stated: "S. 1629 fills the gap in motor carrier regulation as between the States . . ." Representative Harlan expressed the view that the Act "gives the States more rights to control intrastate than they ever had before." 79 Cong. Rec. 12197. Every statute must be interpreted in the light of reason and common understanding to reach results intended by the legislation. *Rathburn v. U. S.*, 355 U.S. 107, 78 S. Ct. 161, 2 L. Ed. 2nd 134. The result reached by the District Court represents a result intended to be accomplished by the Federal Motor Carrier Act.

It may also be seen from the National Transportation Policy (see Note preceding Section 201, 49 U.S.C. §301) that one of the purposes of the Motor Carrier Act was to have the federal government "cooperate with the several states and the duly authorized officials thereof." Moreover under §202(b) of Part 2 of the Interstate Commerce Act (49 U.S.C. §302(b)), Congress clearly intended that the integrity of the states in their jurisdictional sphere was to be respected. Congress accordingly provided:

"Nothing in this part shall be construed . . . to authorize a motor carrier to do an intrastate business

> on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intra-state commerce by motor carriers on the highways thereof."

Congress to enable the I.C.C. to effectively administer the provisions of the I.C.C. Act and carry out its purposes gave plenary authority to the Interstate Commerce Commission in Section 204(a)(6) of Part II of the Interstate Commerce Act, 49 U.S.C. 304(a)(6) when it provided:

> "It shall be the duty of the Commission—(6) To administer, execute and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; . . ."

It was with these facts in mind as well as others that the Interstate Commerce Commission in its order of March 19, 1962, stated as follows:

> "Although subterfuge operations, unlike the operations involved in the *Castle* case, are not specifically condemned by any regulation of the Commission, cooperation between the Federal government and the several States is woven by necessary implication into the fabric of the Motor Carrier Act and is expressly required by the national transportation policy. We believe that the requirement of Federal-State cooperation in motor carrier regulation is sufficiently definite and essential to support a complaint filed on behalf of a State under section 204(c) of the Act and the issuance of an appropriate compliance order."

If the doctrine of subterfuge was nonexistent as appellant claims, your Honorable Court would hardly have cited in the *Service* case its prior decision of *Castle v.*

Hayes Freight Lines, 348 U.S. 61, 75 Sup. Ct. 191 (1954). That case as your Honorable Court may recall involved a motor carrier which continually violated the State Highway Regulations of the State of Illinois while he was engaged in the transportation of goods in interstate commerce under a certificate of public convenience and necessity issued by the Interstate Commerce Commission. The question raised by that case was whether the State of Illinois could bar the carrier from use of the State roads because of repeated violations pertaining to weight. In that case your Honorable Court held that the State could not bar a carrier, but in such cases the Interstate Commerce Commission could. Your Honorable Court said, 348 U.S. at page 65:

> "If, therefore, motor carriers persistently and repeatedly violate the laws of a state, we know of no reason why the Commission may not protect the state's interest either on the Commission's own initiative or on complaint of the state."

The citation of this case by your Honorable Court in the *Service* case makes it clear that the question of subterfuge is an analogous situation and the Interstate Commerce Commission, by the same token, would be the proper tribunal to protect the states' interests.

(II) The Findings of the Interstate Commerce Commission Are Supported by Substantial Evidence

A. Scope of Review

The scope of review was adequately set forth in the frequently cited case of *I.C.C. v. Union Pacific R.R. Co.*, 222 U.S. 541, on pages 547-548, 32 S. Ct. 108, 56 L. Ed. 308 (1912), wherein your Honorable Court said:

> "In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' Illinois C. R. Co. v. I.C.C., 206 U.S. 441, 51 L. Ed. 1128, 27 Sup. Ct. 700. Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the *facts further* than to determine whether there was **substantial evidence** to sustain the order."

B. Analysis of the Evidence

No useful purpose would be served in this Motion to Affirm to detail all the evidence contained in the record

which is relevant to the question of the sufficiency of the evidence to support the finding of subterfuge. The case at bar came before three different levels of authority within the I.C.C. and each one without exception agreed that the evidence established subterfuge. The District Court in its Conclusions of Law finds that "there is overwhelming evidence".

It will suffice for this Motion to quote excerpts from the decision of the Opinion of the full Commission and Division 1 pertaining to the evidence.

The I.C.C. in its report said (see JS 21a-22a):

"Hudson and Arrow solicit freight originating at Philadelphia and destined to Allentown, Pa. They provide a regular service between those two points. Neither holds appropriate intrastate authority, but both are authorized on the face of their interstate certificates to provide the service by routing the involved traffic through New Jersey. The normal route between Philadelphia and Allentown is via U. S. Highway 309, a distance of 52 miles, requiring one hour and 50 minutes of driving time. The distance via Hudson's and Arrow's circuitous interstate routes is over 100 miles requiring three and one-half hours driving time. No stops are made to pick up or deliver freight in New Jersey. No economic justification for the circuitous routing of traffic was shown by either defendant.

"We are convinced that in the absence of regulation by the Commonwealth of Pennsylvania both defendants would use the normal and direct routes between the Pennsylvania points and hold themselves out to serve. We are satisfied, as were division 1 and

the examiner, that in the transportation of freight moving between Pennsylvania points without a prior or subsequent interstate movement, the defendants have attempted in bad faith to convert what is essentially intrastate commerce into interstate commerce and thus to defeat the regulatory laws and policies of the Commonwealth of Pennsylvania. In other words, this is a case of subterfuge, pure and simple."

We also quote from the opinion of Division 1 summarizing the evidence in a similar manner:

"Circuitous routing, between points in a State through another State, in and of itself, is not conclusive evidence of a 'bad faith' interstate operation. But other factors may exist which, when coupled with circuity, warrant a different conclusion. In the proceedings before us the interstate routes utilized by Hudson and Arrow are longer, between the various concerned Pennsylvania points, than are existing all-Pennsylvania routes which are normally used by intrastate carriers. Transporting traffic over the interstate routes, therefore, involves circuitous routing. Here for example, the distance between Arrow's Philadelphia terminal and its Allentown terminal, over its interstate route hereinabove described, is approximately 110 miles. The comparable distance over more direct routes entirely in Pennsylvania, between Philadelphia and Allentown, is approximately 52 miles. Officers of both Hudson and Arrow admit that, absent any regulation of the challenged transportation, shorter or more geographically direct routes would be employed by each in transporting freight from Philadelphia to, for example, Scranton.

"No logical reason appears for the present routing of the intrastate freight other than the fact that defendants are without intrastate authority to transport it; and from the record, it fairly appears that the only reason for such routing is so that Hudson and Arrow may participate in intrastate traffic purportedly under rights arising from certificates issued by this Commission. All things considered, we are convinced that both Hudson and Arrow have, in their respective operations hereinabove described, by which they have transported freight moving between Pennsylvania points without a prior or subsequent interstate movement, attempted in bad faith to convert, to interstate traffic, traffic which, but for their routing, is actually in intrastate commerce subject to the laws of Pennsylvania."

There may be cases where circuitous routing may not establish subterfuge because of the other facts and evidence in the case. On the other hand, there may be cases where circuitous routing, together with the other evidence, sufficiently establishes subterfuge. This, of course, depends on the justification or lack of justification for the circuitous routing. It is respectfully submitted that no logical reason appears in this record why the circuitous routing by New Jersey has been undertaken, other than for the purpose of converting what normally would be considered intrastate commerce into interstate commerce.

The nub of the evidence establishes that the routes travelled by Arrow via New Jersey are not the normal, logical or usual routes for transportation between Philadelphia and Allentown, and Philadelphia and Scranton and the other points mentioned, Williamsport, Olyphant, etc.

The routes used by Arrow, on the contrary, are unreasonably and excessively circuitous, involving as much as twice the distance. The usual and normal routes for the points served by Arrow within Pennsylvania are situated entirely within the Commonwealth of Pennsylvania.

In the transportation involved in this case, no stops are made at any time in New Jersey to pick up or deliver freight there. The President of Arrow, John E. Ackerman, admitted in his testimony that in the absence of regulation his company would not go into New Jersey but would use the Pennsylvania Turnpike.

No logical reason or justification appears for routing state freight by way of New Jersey other than to "convert" what is intrastate commerce into interstate commerce. All that Arrow is doing by taking the freight into New Jersey is giving the freight a free ride for 50 extra miles into the State of New Jersey. These and other facts not only constitute substantial evidence, but overwhelming evidence, we submit, of subterfuge.

The Hearing Examiner in his report summarizes the evidence in the following excerpt:

> ". . . subterfuge by . . . Arrow is shown . . . (b) by the handling of a *substantial* volume of intrastate traffic which moves solely between an origin point in Pennsylvania and a destination point in the same State, (c) by advertising direct service on shipments of this traffic, (d) by the movement of this traffic in New Jersey with no stops in that State to pick up or deliver freight, except the stops made by Arrow at its Phillipsburg terminal, (e) by the transportation of this intrastate traffic over interstate routes which are about 100 percent longer than the existing intra-

state routes from Philadelphia to Allentown, and somewhat longer than the existing intrastate routes from Philadelphia to Scranton, and (f) by admissions on the part of . . . Arrow that if no intrastate authority or interstate authority was required for the movement of this traffic, these carriers probably would transport the freight over the shorter and more direct intrastate routes. . ."

We believe what was said in *Swift & Co. v. U. S.*, 343 U.S. 373, 72 S. Ct. 716, 96 L. Ed. 1008 (1952), is apropos: "When that judgment [of the I.C.C.] is based on findings abundantly supported by the evidence on the whole record, as it is in this case, it is the duty of the courts to sustain it (citations omitted)."

(III) The I.C.C. Did Not Place the Burden of Proof Upon Plaintiff

One last point requires comment. Appellant argues that the I.C.C. improperly placed the burden of proof upon appellant when it *found as a fact* that appellant had no economic justification for operating 110 miles into New Jersey when it could travel 52 miles in Pennsylvania to get to the same place. Every carrier, of course, attempts to maximize profits by reducing expenses. Extra mileage means extra wear and tear, extra gas, extra driving, extra wages, etc. What reason would a prudent carrier have for engaging in what obviously is an uneconomic and wasteful mode of operation **other than to circumvent Pennsylvania regulatory control?**

Nowhere does the I.C.C. lay the burden of proof upon the plaintiff in our complaint proceeding. But it can *find* as a *fact* that no economic justification exists.

Findings of this nature are made in many instances. For example, in criminal law where a defendant is found in possession of recently stolen goods, he should explain how he came by it. The failure of explanation can be found to be a factor in establishing guilt. At no time does the burden of proving criminality shift from the State to the defendant.

This type of fact-finding (i.e., that there was no reason for it, there was no justification for it, etc.) exists in many situations, and does not affect the burden of proof. It may, of course, shift the burden of going forward, which

happens on many occasions according to our rules of evidence where a prima facie showing is made and the means of explanation are within the exclusive knowledge of the defendant.

If citation is necessary on the point in question, the *Eichholz* case may be cited. There the Federal District Court, which held the transportation to be a subterfuge and refused an injunction, said during the course of its opinion, 23 Fed. Supp. p. 591:

> "In this case the plaintiff hauled truckloads of merchandise from shippers or consignors in St. Louis, Mo., to consignees in Kansas City, Mo. It was neither a normal nor a natural route, to extend the carriage to the terminal depot in Kansas City, Kansas. **There was no reason for it.** It was not a matter of convenience to the shipper, nor was it a matter of convenience to the carrier. Immediately that the haul terminated at the depot or terminal in Kansas City, Kansas, a new driver and in some instances with the same tractor took the merchandise or property back over the same traffic way and effected immediate delivery in Kansas City, Missouri. It was patent that the object of the shipper was to secure the benefit of a lower tariff by converting the shipment into an interstate haul."

VII. CONCLUSION

The entire record, which consists of the notes of testimony taken in both the *Hudson* and *Arrow* cases, contains a great deal of evidence on the issue of subterfuge. Not only was circuity established, but also a number of other factors which would be inconsistent with bona fide and legitimate activity normally associated with genuine operations. In this case we have uneconomical operations, wasteful operations, out-of-the-way routes, misleading advertising, a substantial traffic in local business intended to divert business from intrastate carriers, and so on.

The Interstate Commerce Commission did not place the burden upon Arrow Carrier Corporation, but merely found as a fact, that there was no economic justification for the transportation, which was a factor it had a right to consider.

The Interstate Commerce Commission's reasoning in its opinion is flawless. It very astutely reasoned that if the kind of subterfuge engaged in by plaintiff did not violate the Interstate Commerce Act, the Commission would have no jurisdiction even to entertain a complaint filed under Section 204(c) of the Act. This section gives direct authority to the Commission to investigate alleged violations of the Interstate Commerce Act, and to issue appropriate orders to compel compliance.

The Interstate Commerce Commission went on to say that obviously the Supreme Court of the United States

in the *Service Storage* case would not have suggested to the Commonwealth of Virginia a remedy that was in fact not available. That cooperation between the federal government and the several states is woven by necessary implication into the fabric of the Motor Carrier Act of 1935 is evidenced by the national transportation policy, the multitude of provisions in the Act dealing with federal-state coordination and cooperation, the underlying purposes of the legislation, etc.

The decision of the Interstate Commerce Commission in this case protects the respective spheres of governmental action and quashes undesirable and unwanted gypsy-like activity. We commend the I.C.C. decision as a truly well thought out and excellently worded statement of what the law is in this delegated area of regulation.

There is no confusion in the law. The instant case is a logical sequel to the *Service* case. The question of subterfuge is one of fact. As was said in *Eichholz v. P. S.C.*, 306 U.S. 268 at page 275: "The ultimate question is thus one of fact. . ."

The decision of the District Court in this case does not cast any doubt upon *Greyhound Lines*, or the other decisions, since *Greyhound Lines* expressly recognizes the principle of subterfuge.

Wherefore, we respectfully submit that the I.C.C. decision in this case has a very rational basis, is well documented by legal reasoning, strongly substantiated by evidentiary support, and extremely sound as a matter of logic. We further respectfully submit, therefore, that the appellant presents no substantial question for the decision

of this Court, and we pray that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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